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ABSTRACT

This paper presents an outline and analysis of federal legislation and court decisions relevant to the exclusion of students with disabilities by school systems through the filing of delinquency and other petitions based upon in-school behavior. In many cases the behavior is related to the disability and/or to the consequences of the school system's past failure to provide appropriate educational and related services. The issue is examined in terms of these legislative acts or court decisions: Honig v. Doe, Individuals with Disabilities Education Act (IDEA), Section 504 of the Rehabilitation Act of 1973, the Family Educational Rights and Privacy Act (FERPA), and the Americans with Disabilities Act (ADA). Advocates for students are urged to look for 10 specific violations of rights under IDEA, Section 504, the ADA, and FERPA. In summary, these rights are: (1) the right under Section 504, the ADA, and FERPA. to be free from discipline for conduct related to a disability; (2) the right consistent with IDEA and FERPA to confidentiality of education records and personally identifiable information contained therein; (3) the schools' ongoing obligation under IDEA and the Section 504 regulations to identify and evaluate students who may have disabilities; (4) the right under IDEA and Section 504 to a free appropriate public education including related services and accommodations; (5) the schools' ongoing obligation under IDEA and Section 504 to respond to behavioral problems by reevaluating students, and reviewing and revising as necessary the services provided; (6) the right under IDEA and Section 504 to have educational decisions made by a team of qualified persons with parent involvement; (7) the right to be educated in regular settings with nondisabled peers to the maximum extent appropriate; (8) the right to access IDEA and Section 504 administrative due process hearing procedures; (9) the right of a student to remain in a current placement pending completion of IDEA administrative and judicial review proceedings; and (10) "stay-put" rights may only be disturbed by courts of competent jurisdiction under the circumstances set forth in Honig v. Doe. (Contains extensive footnotes and in-text citations of the pertinent laws.) (DB)

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CHALLENGING ABUSIVE FILING OF JUVENILE PETITIONS AGAINST CHILDREN WITH DISABILITIES BY SCHOOL OFFICIALS

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September 1996

I. Issue

In 1988 the Supreme Court held in *Honig v. Doe*, 484 U.S. 305, 108 S.Ct. 592, that school officials may not unilaterally remove even "dangerous" or "disruptive" children with disabilities from their educational placements. Rather, the court held, exclusion from school for more than 10 days constitutes a "change of placement" for purposes of the Individuals with Disabilities Education Act ("IDEA"), subject to all IDEA procedural requirements governing such changes. *Honig* further held that only a court of competent jurisdiction, in the exercise of its equitable powers, may authorize a school system to temporarily remove a child from school despite this right, and then only if the school system demonstrates (1) that exhaustion of administrative remedies would be futile, and (2) that maintaining the child's placement is "substantially likely to result in injury either to himself, herself, or to others. The burden on school districts seeking such an injunction is "substantial."[1]

Faced with these limits on their ability to exclude unwanted students directly, school systems are increasingly turning to the juvenile courts, filing delinquency and other petitions based upon in-school behavior. Often this behavior is related to disability and/or to the consequences of the school system's past failure to provide appropriate educational and related services. Such resort to the courts thus circumvents not only *Honig*, but also the legal obligation under IDEA, Section 504 of the Rehabilitation Act of 1973 and Title II of the Americans with Disabilities Act to provide a free appropriate public education to all children, regardless of the nature or severity of their disabilities. In addition, where school personnel provide information to prosecutors or courts, student rights under the Family Educational Rights and Privacy Act ("FERPA"), which provides for the confidentiality of education records, may also be violated.[2]

[1] 484 U.S. at 327-28.

[2] Note, however, that two recent federal legislative developments may complicate efforts to protect students against abusive petitions. First, a recently enacted federal law requires local

II. Identifying Legal Violations and Strategies

Advocates have available to them multiple strategies for combatting abusive juvenile petitions. They may invoke IDEA's provisions regarding administrative hearings and civil actions to prevent offending school systems from going forward with juvenile proceedings.[3] There are also sound legal bases for urging juvenile courts to refrain from exercising their jurisdiction on the ground that what is presented through the juvenile petition is in reality an educational dispute within the purview of IDEA and other disability laws, and therefore inappropriate for resolution through the juvenile system. Where juvenile proceedings go forward nonetheless, advocates may use IDEA, §504 and the ADA to obtain better outcomes for clients.

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educational agencies that receive federal funds under the Elementary and Secondary Education Act of 1965 to have "a policy requiring referral to the criminal justice or juvenile delinquency system of any student who brings a firearm or weapon to a school served by such agency." The statute does not define the term "weapon," and is silent as to children with disabilities. Significantly, however, this provision was enacted at the same time that Congress amended 20 U.S.C. §1415(e)(3) to specifically address the manner in which schools are to react if a child with *disabilities* brings a dangerous weapon to school (as discussed *infra* in note 15). As a matter of statutory construction, IDEA's comprehensive and specific treatment of children with disabilities, in §1415(e)(3) as amended and elsewhere, should take precedence over the generic language of the new §8922. *See Busic v. United States*, 446 U.S. 398, 406 (1980) ("a more specific statute will be given precedence over a more general one, regardless of their temporal sequence").

Second, pending proposed House and Senate bills reauthorizing IDEA, H.R.3268 and S.1578, provide that nothing in IDEA shall be construed "to prohibit an agency from reporting a crime committed by a child with a disability to appropriate authorities or to prevent State law enforcement and judicial authorities from exercising their responsibilities with regard to the application of Federal and State law to crimes committed by a child with disability [sic]." The terms "crime" and "appropriate authorities" are not defined. As of September 1, 1996, H.R. 3268 had passed in the House, and S.1578 had passed in committee, but not yet moved on to the Senate floor.

[3] IDEA grants administrative hearing officers and courts broad authority to grant "appropriate" relief. Under proper circumstances, this may include ordering school officials to attempt to have juvenile petitions dismissed. *See Morgan v. Chris L.*, 927 F. Supp. 267 (E.D. Tenn. 1994)(appeal pending). As *Morgan* noted, this is quite different than enjoining the juvenile proceeding itself. For an IDEA case in which a federal court ordered private parties to seek dismissal of a civil action they had filed in state court, see *Parents of Child v. Coker*, 676 F. Supp. 1072 (E.D. Okl. 1987). The private parties in *Coker* had filed an action under the state's contagious disease control law in an effort to prevent a child who was emotionally disturbed and HIV-positive from attending his IDEA placement, and the state court had issued a TRO barring him from school. The federal court also enjoined the defendants from prosecuting the state court action, and ordered them to move to have the TRO dissolved.

There is no single, overarching legal rule upon which advocates may rely to argue that it is unlawful for school personnel to file or cooperate in the filing or prosecution of juvenile petitions against children with disabilities, or that juvenile courts cannot (or, in the exercise of their discretion, should not) entertain such petitions. Rather, the legal arguments and strategies available will depend upon a number of factors, including the point in the process at which advocates intervene (e.g., filing of the petition, assumption of jurisdiction by the court, adjudication, disposition, post-disposition); the child's educational history (academic and behavioral), along with the school system's responses to that history; the nature and severity of the child's disability; the school's overall response to the behavior or incident that triggered the petition; the identity of the individual filing or seeking the filing of the petition; the school system's policies, practices and procedures regarding the filing of charges; and the details of the state's juvenile code.

In reviewing these facts, advocates should look for violations of any of the following rights under IDEA, §504, the ADA and FERPA:

1. **The right under §504 and the ADA to be free from discipline for conduct related to a disability.** 29 U.S.C. §794; 34 C.F.R. §§104.3(j), 104.4(b), 104.33, 104.35; 42 U.S.C. §12132; 28 C.F.R. §38.130(a),(b) (implementing the ADA).[4] Where school systems file punitive petitions based upon disability-related conduct, rights against discrimination are violated.

2. **The right consistent with IDEA and FERPA to confidentiality of education records and personally identifiable information contained therein.** 20 U.S.C. §1232g(b); 34 C.F.R. part 99; 34 C.F.R. §300.571. The IDEA regulations require parental consent before personally identifiable information is disclosed to anyone other than "officials of participating agencies collecting or using the information under this part...or..used for any purpose other than meeting a requirement of this part." They also expressly incorporate the FERPA statute and regulations. Unless circumstances fall within one of the narrow statutory exceptions, school personnel who draw upon education records (without parental consent) in filing, pursuing or supporting petitions filed against students, or who utilize information of which they are aware as a result of their access to education records, violate FERPA's confidentiality requirements (in addition to any IDEA violation). FERPA is discussed in further detail in section IV, below.

3. **Schools' ongoing obligation under IDEA and the §504 regulations to identify and evaluate students who may have disabilities.** 20 U.S.C. §1412(2)(c), 1414(a)(1)(A); 34 C.F.R. §300.128, 300.220; 34 C.F.R. §§104.32, 104.35. The obligation to identify and evaluate extends throughout a child's educational career. Furthermore, inappropriate or disruptive behavior should trigger an evaluation for

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[4] *Cf. School Administrative Unit #38 (NH)*, 19 IDELR 186 (U.S. Dept. of Ed./Office for Civil Rights 7/23/92); *Ohio County (KY) School District*, 17 EHLR 528 (U.S. Dept. of Ed./Office for Civil Rights 12/5/90); *Compliance Review of Riverview (WA) School District*, EHLR 311:103 (U.S. Dept. of Ed./Office for Civil Rights 6/3/87); and *Nash County (NC) School District*, EHLR 352:37 (U.S. Dept. of Ed./Office for Civil Rights 8/12/85.

possible disability and related educational needs.[5] A school system's failure to identify a child as having a disability and, so, to provide appropriate educational programming, may cause the very difficulties underlying the juvenile petition.[6] Years of educational failure resulting from the denial of appropriate services may also create, or exacerbate, what school officials deem "behavior problems."[7] Where school systems fail to identify and serve children with disabilities and then file juvenile petitions based upon the resulting behavioral difficulties, they in affect criminalize children for the consequences of the school's own violation of federal law.

4. The right under IDEA and the regulations implementing §504 to a free appropriate public education, including appropriate special or regular education and related services, and the right under the regulations implementing §504 and the ADA to aids, services and accommodations necessary to ensure that students with disabilities receive an education that is as effective as that provided students without disabilities. 20 U.S.C. §§1401(a)(16, (17), (18), 1412(1), 1414(a); 34 C.F.R. §§300.8, 300.16, 300.17, 300.300 (implementing IDEA); 34 C.F.R. §§104.4(b)(1), (2), 104.33 (implementing §504); 28 C.F.R. §38.130(b)(1), (3), (7), (8) (implementing the ADA). Both IDEA and the §504 regulations require states and school systems to provide individually tailored, appropriate special education and related services to all children with disabilities, regardless of severity. For students with problem behavior, including aggressive behavior, the duty to provide a free appropriate public education includes the duty to provide the services necessary to remedy behavioral problems and their underlying causes.[8] Behavior that prompts school personnel to take disciplinary action, or initiate juvenile proceedings, may in fact be a sign that the educational services being provided to the child are not appropriate.[9] Where a school system fails to provide a free

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[5] *See, e.g., Mineral County (NV) School District*, 16 EHLR 668 (U.S. Dept. of Ed./Office of Civil Rights 3/16/90) (enforcing §504)

[6] See cases cited in footnote 9, below.

[7] *See, e.g., Morgan v. Chris L., supra.*

[8] *See, e.g., Chris D. v. Montgomery Bd. of Ed.*, 753 F. Supp. 922 (M.D. Ala. 1990) (school failed to provide appropriate educational program to emotionally disturbed student where, rather than employing strategies to teach him appropriate behavior with the goal of ultimately returning him to the regular education setting, Individualized Education Program merely described classroom rules and punishments and rewards for breaking them or following them; student had repeatedly been subject to disciplinary sanctions). *See also Honig, supra*, 484 U.S. at 309 (recognizing that the exclusion from school of large numbers of children with severe emotional disturbance was a key factor in the enactment of what has become IDEA).

[9] *See Chris D., supra*; *Stuart v. Nappi*, 443 F. Supp. 1235, 1241 (D. Conn. 1978) (school's "handling of the plaintiff may have contributed to her disruptive behavior"); *Howard S. v. Friendswood School District*, 454 F. Supp. 634, 640 (S.D. Tex. 1978)(finding that plaintiff, whom school officials sought to expel following a suicide attempt and hospitalization, "was not

appropriate public education and instead seeks court involvement to address the behavioral and other educationally-related needs for which IDEA, §504 or ADA hold it responsible, it breaches these federal law obligations and violates corresponding rights.

5. **Schools' ongoing obligation under IDEA and the §504 regulations to respond to behavioral problems by reevaluating students, and reviewing and revising as necessary the services provided them.** 20 U.S.C. §§1401(a)(20)(F), 1414(a)(5); 34 C.F.R. §§300.343(d), 300.534(b); 34 C.F.R. part 300, App. C, paras. 10, 34.[10] As explained above, the obligation to provide a free appropriate public education includes the obligation to address effectively behavioral manifestations. This obligation also includes the duty to monitor educational performance, and to review and revise a child's educational program as necessary. Deterioration in a child's behavior or repeated behavior problems should trigger a reevaluation of the child and/or a review of whether the educational services being provided are in fact appropriate. IDEA sets forth detailed requirements regarding the manner in which programmatic reviews and decisions regarding the provision of a free appropriate public education to any given child are to be made, including decisions regarding behavioral problems and strategies to address them.[11] While IDEA does not necessarily require the convening of a team meeting to

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afforded a free, appropriate public education during the period from the time he enrolled in high school until December of 1976, [which] was...a contributing and proximate cause of his emotional difficulties and emotional disturbance"); *Frederick L. v. Thomas*, 408 F. Supp. 832, 835 (E.D. Penn. 1976) (recognizing that an inappropriate educational placement can cause antisocial behavior); *Lamont X. v. Quisenberry*, 606 F. Supp. 809, 813 n.2 (S.D. Ohio 1984)("....we cannot help but be troubled by the decision to prosecute the minor plaintiffs for the August disturbances, particularly when prosecution was combined with removal from the classroom for several months. Plaintiffs' handicap by definition includes a likelihood for behavioral disturbances, and the fact that defendants chose criminal prosecution as an appropriate response to such behavior leads us to question whether the school may have simply decided that it was time to take harsh action in such instances as a policy matter, a result which we do not perceive as wholly in keeping with the spirit and purpose of the EAHCA [now IDEA]"); *Inquiry of Fields*, EHLR 211:437 (U.S. Dept. of Ed./Office of Special Education Programs 1987) (OSEP "would encourage States and localities to be alert to the possibility that repeated discipline problems may indicate that the services being provided to a particular child with a handicap should be reviewed or changed....").

[10] *See also Response to Inquiry of Fields*, Educ. Handicapped. Law Rep. 211:437 (U.S. Department of Education/Office of Special Education Programs 1987) (OSEP "would encourage States and localities to be alert to the possibility that repeated discipline problems may indicate that the services being provided to a particular child with a handicap should be reviewed or changed...."); *Mineral County (NV) School District*, *supra*. *Cf. Honig*, *supra*, 484 U.S. at 326 (noting that where a student poses an immediate threat to the safety of others, school officials may remove a child from school for up to ten days while initiating an IEP review).

[11] Mandated procedures include convening of an IEP team meeting, with full consideration of the child's needs, evaluation data, current program and placement, and placement options,

review a child's educational status and programming each time an incident of problem behavior occurs, a situation significant enough to warrant, in the eyes of school personnel, the filing of a juvenile court petition should in and of itself trigger the above-described review. Where schools substitute juvenile prosecution for the required review, they should be deemed to be in violation of this federal law obligation.

6. **The right under IDEA and §504 to have educational decisions--including decisions regarding necessary and appropriate services, appropriate responses to behavioral problems, placement, and the relationship between disability and conduct made by a team of qualified persons, with parent involvement, consistent with statutory and regulatory procedures.** 34 C.F.R. §§300.343 - 300.345, 300.504, 300.505, 300.533; 34 C.F.R. §104.33(b), 104.35, 104.36. The right to a free appropriate public education includes the right to have educational decisions made in accordance with the procedures set forth in IDEA and the regulations implementing it.[12] A unilateral decision by a school official to respond to behavioral manifestations by filing delinquency charges arguably violates these rights.

7. **The right to be educated in regular education settings with non-disabled peers to the maximum extent appropriate in view of a student's needs.** 20 U.S.C. §1412(5)(B); 34 C.F.R. §300.550, 300.552(c); 34 C.F.R. §104.34(a), 104.4(b)(iv); 28 C.F.R. §35.130(b)(1)(iv), (b)(2), (d). Placement in separate settings or other removal from regular education is permissible only where the school system demonstrates that education in the regular setting cannot be achieved satisfactorily, even with the use of supplementary aids and services. Furthermore, where a child with behavioral manifestations is not being educated in the regular education setting, the school's response to behavioral issues must be designed to enable the child's eventual return to the mainstream.[13]

8. **The right to access IDEA and §504 administrative due process hearing procedures to resolve educational disputes, and to have those disputes ultimately resolved by a federal court or state court of competent jurisdiction.** 20 U.S.C. §1415(b) -(e); 34 C.F.R. §300.506 - 300.512; 34 C.F.R. §104.36. These rights include the right to file a complaint and have an impartial due process hearing on any matter regarding the education of a child with disabilities and, if aggrieved by the outcome, to bring a civil action in a federal district court or state trial court. Where schools respond to behavioral problems by invoking the juvenile courts, these rights may be seriously compromised.

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consistent with 34 C.F.R. §§300.343, 300.344 and 300.533, and meaningful opportunity for, and efforts by school officials to ensure, parental participation in the meeting, as per 34 C.F.R. §§300.344-.345.

[12] *Bd. of Ed. of Hendrick Hudson Central Schl. Dist. v. Rowley*, 458 U.S. 176, 206-07 (1982); *Honig v. Doe*, 484 U.S. 305, 324-25 and n.8.

[13] *Chris D., supra.*

9. **The right of a student to remain in his or her current placement pending completion of IDEA administrative and judicial review proceedings, unless the parent and school system or state agree otherwise.** 20 U.S.C. §1415(e)(3), also known as the "stay-put" provision. Where detention follows the filing of a juvenile petition, or the court or a state agency with custody orders a particular placement pending or following adjudication, "stay-put rights" are abrogated.[14]

10. **The right to have §1415(e)(3) "stay-put" rights disturbed only by courts of competent jurisdiction under the circumstances set forth in *Honig v. Doe*.** *Honig* held that only a court of competent jurisdiction, in the exercise of its equitable powers, may authorize a school system to temporarily remove a truly dangerous child from school despite §1415(e)(3), and then only if the school system demonstrates that (1) exhaustion of IDEA administrative remedies would be futile, and (2) maintaining the child's placement is "substantially likely to result in injury either to himself, herself, or to others."[15] The school district must also demonstrate that it has made reasonable efforts to minimize any risk of harm through the use of supplementary aids and services.[16]

Honig assumes five conditions as prerequisites to a valid court order removing a disabled child from his or her school placement: (1) that §1415(e)(3) is applicable, meaning that a due process hearing or review, pursuant to §1415(b),(c), or a civil action pursuant to §1415(e)(2) is pending in which a final determination will be made regarding appropriate educational services for the child consistent with IDEA requirements; (2) that the order removing the child is a temporary one, pending completion of those proceedings; (3) that the court issuing the order is a federal district court or a state court of competent jurisdiction hearing a civil action brought pursuant to §1415(e)(2); (4) that the court issuing the order is one with the broad remedial powers envisioned by

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[14] Congress recently created an exception to "stay-put" rights for children with disabilities who bring firearms to school, where the child's conduct is not related to his or her disability. Effective October 20, 1994, the child's IEP team may place him or her in an interim alternative educational placement, in accordance with state law, for up to 45 days, even over parental objection. See 20 U.S.C. §1415(e)(3)(B) as added by §314(a) of the Improving America's Schools Act of 1994, Pub. L. 103-382 (October 20, 1994); §314(b) of the Improving America's Schools Act, to be codified as a note to 20 U.S.C. §8921 (providing that the changes to §1415(e)(3) "shall be interpreted in a manner that is consistent with the Department's final guidance concerning State and local responsibilities under the Gun-Free Schools Act of 1994"); H.R. Conf. Rep. No 761, 103rd Cong., 2d Sess. 883 (clarifying that "the Department's final guidance..." is the U.S. Department of Education document printed in the Congressional Record of July 28, 1994 at S. 10017).

[15] 484 U.S. at 327.

[16] *Light v. Parkway C-2 School District*, 41 F.3d 1223 (8th Cir. 1994).

§1415(e)(2)[17]; and (5) that the child has been proven in that court to be dangerous under the *Honig* standard. These prerequisites seldom, if ever, exist within the juvenile justice system.

11. **The right under IDEA, §504 and the ADA to receive necessary educational and related services at no cost to parent or child.** 20 U.S.C. §1401(a)(18)(A); 34 C.F.R. §300.8(a); 34 C.F.R. §104.33(a), (c); 28 C.F.R. §35.130(f).[18] In jurisdictions that permit recovery against parents for court-ordered services or services otherwise provided to children in state care or custody, this right may be violated.[19]

12. **The obligation of all "public agencies" in the state to comply with IDEA's substantive and procedural requirements.** 20 U.S.C. §1412(6); 34 C.F.R. §§300.2(b), 300.14, 300.121(c)(1), 300.152, 300.501. The regulations implementing IDEA explicitly state that their provisions apply to "all political subdivisions of the State that are involved in the education of children with disabilities," including, in addition to state and local educational agencies, "[o]ther State agencies...such as Departments of Mental Health and Welfare...." 34 C.F.R. §300.2(b). "Public agencies" subject to IDEA requirements are broadly defined as "any...political subdivisions of the State that are responsible for providing education to students with disabilities." 34 C.F.R. §300.14. State agencies granted custody, control or other authority over the education of court-involved youth fall within these provisions.[20]

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[17] 20 U.S.C. §1415(b)(2) directs that a court sitting in an IDEA matter "shall grant such relief as the court determines is appropriate." The Supreme Court has held that this language creates broad equitable powers. *School Committee of Town of Burlington v. Dept. of Education*, 471 U.S. 359 (1985). Juvenile courts, on the other hand, are ordinarily courts of limited statutory jurisdiction and powers.

[18] *See also Shook v. Gaston County Board of Education*, 882 F.2d 119 (4th Cir. 1989), *cert. denied*, 58 U.S.L.W. 3528 (2/20/90); *McLain v. Smith*, 16 EHLR 6 (E.D. Tenn. 1989); *Seals v. Loftis*, 614 F. Supp. 302 (E.D.Tenn. 1985); *Trans Allied Medical Services*, 16 EHLR 963 (U.S. Dept. of Ed./Office for Civil Rights 5/30/90); *Inquiry of Simon*, 17 EHLR 225 (U.S. Dept. of Ed./Office of Special Education Programs 11/9/90); *Inquiry of Stohrer*, EHLR 213:211 (U.S. Dept. of Ed./Office of Special Education Programs 2/24/89).

[19] *See Jenkins v. State of Florida*, 931 F.2d 1469 (11th Cir. 1991) ("maintenance fees" charged directly to parents or collected from third party payors for children with disabilities placed in residential programs by state Department of Health and Rehabilitative Services); *King v. Pine Plains Central School District*, 23 IDELR 976 (S.D.N.Y. 1996) (charging parents "maintenance fees" for court-ordered residential placement would violate IDEA if placement was necessary to meet educational needs).

[20] *See Jenkins*, *supra* (applying IDEA requirements to placement decisions made by state Department of Health and Rehabilitative Services); *Mrs. C. v. Wheaton*, 916 F.2d 69 (2nd Cir. 1990) (applying IDEA [then the EHA] to termination by Dept. of Children and Youth Services of private residential school placement of youth committed to its custody); *Christopher P. v.*

III. Pertinent Decisions On Juvenile Petitions

There have been relatively few judicial decisions explicitly addressing the inappropriate filing of juvenile petitions by school systems and school personnel. Increasingly, however, courts in various jurisdictions have recognized that what is presented through a juvenile petition may in reality be an educational matter within the purview of IDEA and other disability laws, and therefore inappropriate for resolution through the juvenile system. Decisions to date have involved diverse fact patterns, and courts concluding that the petitions at issue were improper have relied upon various aspects of IDEA, §504, state juvenile codes, and state special education law.

A. Federal Decisions

Honig v. Doe, 484 U.S. 305 (1988) (see discussion above re: courts of competent jurisdiction)

Murphy v. Timberlane Regional School District, 22 F.3d 1186, 1196 n. 13 (1st Cir. 1994) ("Timberlane's misconceptions about the IDEA are betrayed...by the contention that its institution of truancy proceedings should be considered the rough equivalent of the administrative adjudication required under [special education regulations]...[A] coercive adversarial proceeding against a parent is no substitute for a substantive review of the special educational needs of a handicapped child")

Morgan v. Chris L., 927 F. Supp. 267 (E.D. Tenn. 1994) (appeal pending) (holding that school officials violated IDEA in filing juvenile petition against a student with Attention Deficit Disorder, and that IDEA administrative due process hearing officer had properly ordered school officials to seek dismissal of the petition). *See also In re Child with Disabilities*, 20 IDELR 61 (Tenn. Dept. Ed. 1993) (underlying administrative decision).

W.F. v. Morgan, Civil Action No. 3-93-cv-618 (E.D. Tenn. Jan. 13, 1994) (order denying motion to dismiss) (rejecting assertion of qualified immunity in action against school officials who had filed delinquency petitions; statutory rights of disabled students alleged to be disruptive or dangerous were "clearly established")

Lamont X. v. Quisenberry, 606 F. Supp. 809, 813 n.2 (S.D. Ohio 1984) ("...we cannot help but be troubled by the decision to prosecute the minor plaintiffs....Plaintiffs' handicap by definition includes a likelihood for behavioral disturbances, and the fact that defendants chose criminal prosecution as an appropriate response to such behavior leads us to question whether the school may have simply decided that it was time to take harsh action...as a policy matter, a result which we do not perceive as wholly in keeping with the spirit and purpose of the EAHCA

Marcus, 915 F.2d 794, 799 (2nd Cir. 1990) (although not required to reach the issue, finding "considerable force" in the argument that IDEA [then the EAHCA] requirements applied to decision to discharge child from psychiatric facility operated by Dept. of Children and Youth Services, as decision affected his educational placement in affiliated school); *King*, 23 IDELR at 979 (rejecting contention of local social services department, by statute financially responsible for court-ordered services, that IDEA did not apply to it).

[renamed the EHA and then IDEA]").

North v. District of Columbia Bd. of Ed., 471 F. Supp. 136, 140 (D.D.C. 1979) (it would be inappropriate to proceed with neglect proceedings where real issue concerned school district's failure to provide special education and related services to which child was entitled).

B. State Decisions

In the Matter of Ruffel P., 582 N.Y.S.2d 631 (Family Court Orange Co. 1992) (dismissing "in the interests of justice" Person In Need of Services petition brought by school principal alleging violent behavior by student, where school had refused to certify child as eligible for special education, failed to try different teaching approaches, and responded solely with disciplinary actions).

In Re: Roger S., 22 IDELR 731 (Maryland Court of Appeals 1995) (juvenile court lacked statutory authority to order school system to provide transition services to student with disabilities; contrary reading of relevant statute "would allow the comprehensive design established in the [state special education statute]...to be routinely circumvented through juvenile court proceedings")

Oscar F. v. County of Worcester, 412 Mass. 38, 587 N.E.2d 208 (1992) (declining "to read court the [Child in Need of Services statute] as authorizing a judge to bypass the detailed processes of [the state special education statute]," and holding that court acting in Child In Need of Services proceeding lacks authority to make special education placement).

In re Tony McCann, 17 EHLR [Education for the Handicapped Law Reports] 551, 553 (Tenn. Crt. Apps. 1990) ("[s]chool discipline problems and a student's failure to perform assignments must be addressed within the administrative framework of the school system before the school system can resort to court intervention"; school's filing of "unruly" petition placing child in juvenile court system constituted change of placement in violation of student's substantive and procedural rights under IDEA [then EHA]; adjudication as "unruly child" reversed based upon juvenile court's statutorily limited jurisdiction).

In the Interest of J.D., 510 So.2d 623 (Fla. App. 1 Dist. 1987) (court did not have dependency jurisdiction over child allegedly in need of placement in a segregated classroom for students with cognitive disabilities; educational needs of child did not form statutory basis of dependency).

In the Matter of Shelly Maynard, 453 N.Y.S.2d 352 (Family Court Monroe Co. 1982) (where child was found to have a disability after being adjudicated a Person in Need of Services on the basis of truancy at the behest of school officials, school would be required to fulfill its obligation to provide appropriate special education and related services; court would renew involvement only if child failed to attend an appropriate placement made pursuant to special education law).

Flint Bd. of Ed. v. Williams, 276 N.W.2d 499 (Mich. App. 1979) (school system may not ask probate court to take jurisdiction over children with disabilities pursuant to state statute regarding students who repeatedly violate school rules or are truant until proceedings under special education law have terminated and a final decision made that no program within the school

system can serve the child's needs).

But see also State of Louisiana in the Interest of B.C., 610 So.2d 204 (Crt. of App. of La. 1992), *writ denied*, 613 So.2d 976, *cert. denied*, 114 S.Ct. 438 (1993) (IDEA did not limit authority of juvenile court to limit the educational program of a student adjudicated to be a Child in Need of Supervision to homebound instruction as a condition of probation). This decision is based upon a misinterpretation of *Honig v. Doe*. A copy of the petition for certiorari in *B.C.* may be obtained from the Center for Law and Education.

IV. The Relevance of FERPA

The Family Educational Rights and Privacy Act[21] prohibits the granting of federal funds to any educational agency or institution which discloses education records or any personally identifiable information contained in the records without the written consent of the parent or the student, if 18 years of age or older.[22] FERPA rights may be implicated where school personnel draw upon education records (without parental consent) in filing, pursuing or supporting petitions filed against students, or utilize information of which they are aware as a result of their access to education records. To date, there do not appear to have been any reported decisions addressing this issue. However, a lawsuit pending in federal district court in West Virginia alleges that school officials violated FERPA by releasing to the media and the police certain information concerning a student's alleged physical altercation with a teacher.[23]

FERPA prohibits oral as well as written disclosure of protected information.[24] The definition of protected "education records" is broad, encompassing "those records, files, documents, and other materials which (i) contain information directly related to a student; and (ii) are maintained by an education agency or institution or by a person acting for such agency or institution."[25] This includes information recorded in any manner including, but not limited to, handwriting, print, tape or film.[26]

Excluded from the definition of protected "education records" are records of a school's "law enforcement unit," provided that they are maintained by the unit and created by the unit

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[21] 20 U.S.C. §1232g.

[22] 20 U.S.C. §1232g(b)(1), (d); 34 C.F.R. §99.3.

[23] See *Doe v. Alfred*, 906 F. Supp. 1092 (S.D.W.V. 1995), denying without analysis defendants' motion to dismiss FERPA claims.

[24] 34 C.F.R. §99.3 (defining "disclosure").

[25] 20 U.S.C. §1232g(a)(4)(A); see also 34 C.F.R. §99.3 (defining "eduction record").

[26] 34 C.F.R. 99.3 (defining "record").

for a law enforcement purpose.[27] The U.S. Department of Education, which is responsible for enforcing FERPA, has recognized that personnel of a school's law enforcement unit are not necessarily permitted access to education records and that, to the extent that they are allowed such access, they may not disclose information contained in those records (e.g., by using such information to create, and then disclose, "records of a law enforcement unit") without written consent.[28] Note that the exclusion of law enforcement unit records does *not* permit the disclosure of disciplinary records, which are encompassed by the broad definition of "education records."[29]

The exceptional circumstances under which protected education records may be disclosed *without* prior written consent are very narrow. They include disclosure in compliance with a judicial order or lawfully issued subpoena, provided that parents and students are notified in advance, and disclosure "to appropriate parties" in connection with a health or safety emergency, "if knowledge of the information is necessary to protect the health or safety of the student or other individuals."[30]. The latter exception is to be strictly construed.[31] For additional exceptions to FERPA consent requirements, see 34 C.F.R. §99.31.

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[27] 20 U.S.C. §1232g(a)(4)(B)(ii); 34 C.F.R. §99.3 as amended at 60 Fed. Reg. 3468-69 (January 17, 1995); 34 C.F.R. §99.8 as added by 60 Fed. Reg. 3469 (January 17, 1995). A "law enforcement unit" is "any individual, office, department, division or other component of an educational agency or institution, such as a unit of commissioned police officers or non-commissioned security guards, that is officially authorized or designated by that agency or institution to (i) [e]nforce any local, State, or Federal law, or refer to appropriate authorities a matter for enforcement...against any individual or organization other than the agency or institution itself; or (ii) [m]aintain the physical security and safety of the agency or institution." 34 C.F.R. §99.8, as added.

[28] See 60 Fed. Reg. 3467 (school may not disclose education records to officials in its law enforcement unit unless school's FERPA policy, required by 34 C.F.R. §99.6, designates such individuals as having a legitimate educational interest in seeing records) and 60 Fed. Reg. 3468 ("FERPA does not permit any party, including the institution's own law enforcement unit, that has received information from education records to redisclose that information without the prior consent of the parent or eligible student....") (January 17, 1995). Regarding redisclosure of information, see also 34 C.F.R. §99.33.

[29] In addition to "records of the law enforcement unit" of a school, also excluded from the definition of protected "education records" are records of instructional, supervisory and administrative personnel that are kept in the sole possession of the maker of the record, and not disclosed to anyone else other than a temporary substitute; certain treatment records of students over 18 years of age; and records that only contain information about an individual after he or she is no longer a student. 34 C.F.R. §99.3 (defining "education records").

[30] 20 U.S.C. §1232g(b)(2)(B); 34 C.F.R. §99.31(9).

[31] 34 C.F.R. §99.36(b).

FERPA was recently amended to more explicitly address the limited circumstances under which school systems may disclose information from education records to juvenile authorities. Education records or personally identifiable information contained therein may be released to state and local officials or authorities to whom such information is specifically allowed to be reported or disclosed pursuant to a state statute adopted *before* November 19, 1974 if the allowed reporting or disclosure concerns the juvenile justice system and it's ability to effectively serve the student in question. If the relevant state statute was adopted *after* November 19, 1974, then reporting or disclosure is only permissible if it concerns the juvenile justice system's ability to effectively serve the student *prior to adjudication*, and the officials or authorities to whom the information is released certify in writing to the school system that the information will not be disclosed to any other party without the prior written consent of the student's parent, except as provided under state law.[32]

FERPA is enforceable by an administrative complaint to the Family Policy Compliance Office of the U.S. Department of Education.[33] Two Courts of Appeals have held that individuals whose FERPA rights have been violated may bring a damages action under 42 U.S.C. §1983 against the offending educational agency or institution.[34]

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[32] *See* Section 249 of the Improving America's Schools Act of 1994, Pub. L. 103-382 (October 20, 1994), amending 20 U.S.C. §1232g(b)(1)(E) (effective upon enactment).

[33] For regulations governing FERPA complaints and enforcement, see 34 C.F.R. §§99.60 - 99.67.

[34] *See Tarka v. Cunningham*, 917 F.2d 890 (5th Cir. 1990); *Fay v. South Colonie Central School District*, 802 F.2d 21, 33 (2d Cir. 1986). For additional decisions holding that FERPA is enforceable through a §1983 action, see *Maynard v. Greater Hoyt School District*, 876 F. Supp. 1104 (D.S.D. 1995); *Belanger v. Nashua NH School District*, 856 F. Supp. 40 (D.N.H. 1994); *Krebs v. Rutgers*, 797 F. Supp. 1254 (D.N.J. 1992). *But see also Norris v. Bd. of Ed. of Greenwood*, 797 F. Supp. 1452, 1465 (S.D. Ind. 1992).

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